

EUROPEAN PARLIAMENT

2004



2009

Committee on Legal Affairs

2006/0135(CNS)

4.12.2007

DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a Council regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters
(COM(2006)0399 – – C6-0305/2006 – 2006/0135(CNS))

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(*): Procedure with associated committees – Rule 47

PA_Legam

SHORT JUSTIFICATION

The Commission proposal deals solely with the question of determining the applicable law and jurisdiction in the case of applications for divorce or separation. It does not, therefore, cover marriage annulment or entitlement to maintenance. The proposal is presented as a partial amendment of existing Council Regulation (EC) No 2201/2003, whose scope is much broader, as it also covers grounds for marriage annulment, parental responsibility and the recognition of judgments in matrimonial matters in an interstate setting.

The proposal mainly relates to ‘international couples’, in other words spouses of different nationalities or who live in different Member States or in states of which they are not nationals. The main new feature of the regulation is that it offers spouses the possibility of choosing the competent court and the applicable law, albeit only from a limited range of options, namely the jurisdictions and laws which have an objective connection with the marriage in question. Under the proposal, the main ‘connecting factor’ is residence. It follows that, if both spouses have the same nationality and have both always lived in the state of which they are nationals, they have no other option than to apply to the courts of the state in which they live, which will apply the *lex loci*, in other words the *lex fori*.

Overall, the proposal seems to be reasonable. It is completely in tune with the free movement of persons, one of the fundamental freedoms on which the whole EU edifice is based, and upholds the principle of party autonomy by allowing parties to choose, if they wish, which courts and which law should govern the proceedings bringing their marriage to an end.

However, your rapporteur considers that some changes should be made to the proposal in order to make it even more effective.

First of all, it should be stipulated that the parties’ freedom of choice should be restricted to the courts and laws of other *Member States*, and that, more generally, in line with the principle of subsidiarity, the proposal cannot oblige the authorities of a state which makes no provision for divorce, or which does not recognise the type of marriage in question, to dissolve a marriage.

Furthermore, under the Commission proposal spouses may choose any of the forums listed in Article 3 of Regulation 2201/2003. In this event, the more restrictive criterion set out in Article 3a(b) would be superfluous. The simplest solution in technical terms would be to delete the whole of point (b). However, it seems from the proposal that the Commission’s intention is to establish a connection with the *lex fori* once the parties are given the possibility of deciding for themselves to which court they will apply. This intention is indicated by point (b). To maintain point (b) while bringing it into line with the substance of Article 3 (by enhancing the parties’ autonomy), the rapporteur suggests that the whole of Article 3(a) should be reworded. Obviously, Article 3 will remain valid and applicable where parties do not exercise their freedom to choose the competent court.

Finally, your rapporteur proposes a criterion which would make it possible to precisely identify the applicable law and preclude the court to which the application is made from exercising any discretionary powers, in cases where the spouses do not exercise their power to choose.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission

Amendments by Parliament

Amendment 1

ARTICLE 1, POINT 2

Article 3a, paragraph 2 (Regulation (EC) No 2201/2003)

1. The spouses may agree that ***a court or*** the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided ***they have*** a substantial connection with that Member State by virtue of the fact that

(a) ***any of the grounds of jurisdiction listed in Article 3 applies***, or

(b) ***it is the place of*** the spouses' last common habitual ***residence for a minimum period of three years***, or

(c) ***one of the spouses is a national of that Member State*** or, in the case of the United Kingdom and Ireland, has his or her "domicile" ***in the territory of one of the latter Member States***.

1. The spouses may agree that the courts of a Member State are to have jurisdiction in a proceeding between them relating to divorce or legal separation provided ***there is*** a substantial connection ***between their marriage and the chosen*** Member State by virtue of the fact that

(a) ***the spouses had their common habitual residence in that State for a continuous period of at least three years, provided that period did not end more than three years before the application for a divorce or legal separation***, or

(b) the spouses' last common habitual residence ***was in that State, and the respondent is still residing there at the time the application is made***, or

(c) ***the applicant's current habitual place of residence is in that State and he or she has resided there for a minimum period of six months if he or she is a national of that Member State or one year if he or she is not a national of that State***, or, in the case of the United Kingdom and Ireland, ***the applicant*** has his or her "domicile" ***there***, or

(ca) at the time of the conclusion of the agreement, one of the spouses is a national of that State or, in the case of the United Kingdom and Ireland, has his or her "domicile" in the territory of one of the latter Member States.

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Justification

Rewording Article 3a makes it possible to list the following criteria for connecting factors on a more rational basis: prolonged common residence; common, albeit brief, residence, provided it is the last place of residence of the couple and the current place of residence of the respondent; the current residence of the applicant for some time past; nationality, possibly of only one spouse. This avoids any conflict between the criteria in question, or between those criteria and Article 3 of the regulation, which will continue to apply in the absence of any agreement between the parties.

Amendment 2

ARTICLE 1, POINT 2

Article 3 (a), paragraph 2 (Regulation (EC) No 2201/2003)

2. An agreement conferring jurisdiction ***shall be expressed in writing and signed by both spouses*** at the latest at the time the court is seised

2. An agreement conferring jurisdiction ***may be concluded or altered at any time, but*** at the latest at the time the court is seised. ***It shall apply to every level of judicial proceeding.***

The agreement shall be expressed in writing, dated and signed by both spouses. It shall comply with any additional formal requirements provided for by the law of the Member State in which the spouses have their habitual residence at the time the agreement is made. If the spouses have their respective habitual residence in different Member States which provide for different formal requirements, the agreement shall be formally valid if it complies with the requirements specified by the law of one or other of those States.

The agreement shall confer exclusive jurisdiction, unless the spouses have agreed otherwise.

Without prejudice to any agreement conferring exclusive jurisdiction, a court of a Member State before which a respondent enters an appearance shall have jurisdiction to the extent that it would

otherwise have had jurisdiction in accordance with Articles 3, 5 or 7 of this Regulation.

Justification

It is appropriate to clarify the formal requirements governing the agreement, stipulate its effects and maintain the general rules governing jurisdiction in the absence of agreement.

Amendment 3

ARTICLE 1, POINT 7

Article 20 a, paragraph 1 (Regulation (EC) No. 2201/2003)

1. The spouses may agree to designate the law applicable to divorce and legal separation. The spouses may agree to designate ***one of the following laws:***

1. The spouses may agree to designate the law applicable to divorce and legal separation; ***their choice shall be confined to the laws of the Member States having a substantial connection with the marriage as specified in Article 3a.***

(a) the law of the State of the last common habitual residence of the spouses insofar as one of them still resides there;

(b) the law of the State of the nationality of either spouse, or, in the case of United Kingdom and Ireland, the “domicile” of either spouse;

(c) the law of the State where the spouses have resided for at least five years;

(d) the law of the Member State in which the application is lodged.

Justification

The criterion proposed here is broader than that put forward in the Commission proposal, which rules out the law of the place of residence of the applicant or respondent alone (even though that law could, in principle, become applicable by virtue of the choice of court, pursuant to Article 20 a (b)).

Amendment 4
ARTICLE 1, POINT 7
Article 20 b (Regulation (EC) No 2201/2003)

In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the State:

In the absence of choice pursuant to Article 20a, divorce and legal separation shall be subject to the law of the *Member State* where the application is lodged *pursuant to this Regulation*.

(a) where the spouses have their common habitual residence, or failing that,

(b) where the spouse had their last common habitual residence insofar as one of them still resides there, or failing that,

(c) of which both spouses are nationals, or, in the case of United Kingdom and Ireland, both have their “domicile”, or failing that,

(d) where the application is lodged.

Justification

Where there is no agreement between spouses, the choice of applicable law is left to the judge, on whom no discretionary power should be conferred, however. What is needed, therefore, is an automatic mechanism which would also make it possible to avoid the delays connected with establishing the place of residence, on which the parties might disagree.

Amendment 5
ARTICLE 1 a (new)
Article 20 f (new) (Regulation (EC) No 2201/2003)

Article 1 a

The following article is inserted in Regulation (EC) No 2201/2003

"Article 20 f

No provision of this Regulation shall oblige the judicial authorities of a Member State whose law makes no provision for divorce or does not recognise the existence of the marriage in question to issue a divorce ruling pursuant to this Regulation.

In such cases, if it is not possible to establish an alternative jurisdiction on the

basis of any of the other criteria set out in Articles 3, 3a and 7, the court of the State in which the marriage was celebrated shall have jurisdiction."

Justification

Uno Stato membro non può essere obbligato a riconoscere come matrimonio, sia pure al solo fine dello scioglimento, un atto non riconosciuto come tale dalla legge di quello Stato. Analogamente, non è conforme al principio di sussidiarietà imporre al giudice di uno Stato membro la cui legge non prevede tale istituto, l'obbligo di pronunciare il divorzio.

D'altronde, una coppia internazionale ha diritto ad una pronuncia di divorzio da parte di almeno un giudice dell'Unione qualora il matrimonio in questione abbia un qualche collegamento con il territorio dell'Unione stessa; perciò, in mancanza di altri collegamenti applicabili ovvero di scelta delle parti, è prevista in via residuale la giurisdizione dello Stato in cui è stato celebrato il matrimonio.